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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Vermont Service Center Date: SEP 26 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of the Foreign Residence Requirement under § 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e)

IN BEHALF OF APPLICANT:

[redacted]

Identifying data deleted to prevent unwarranted invasion of personal privacy

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained, and the matter will be remanded to the director to request a § 212(e) waiver recommendation from the United States Information Agency (USIA).

The applicant is a native and citizen of Mexico who is subject to the two-year foreign residence requirement of § 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), because she participated in graduate medical education or training. The applicant was admitted to the United States as a nonimmigrant exchange visitor in July 1996. The applicant married a United States citizen on January 28, 1997. She is now seeking the above waiver after alleging that her departure from the United States would impose exceptional hardship on her U.S. citizen spouse.

The director determined the record failed to establish her U.S. citizen spouse would suffer exceptional hardship and denied the application accordingly.

On appeal, counsel states that the applicant gave birth to a child on November 29, 1999 and her husband will suffer exceptional hardship whether he accompanies the applicant to Mexico or remains in the United States without her. Counsel asserts that the psychological, financial, career-based and socio-cultural hardships he will suffer, when viewed as a totality of circumstances, are greater than the "normal problems encountered" by separation or accompaniment.

Counsel reviews the qualifications of the applicant's husband (hereafter referred to as [redacted] his expertise in drug development processes, his 15 years experience, his salary and states that [redacted] would have exceptional difficulty reentering the highly competitive pharmaceutical research market if he spent two years in Mexico with his wife and child. Counsel discusses other unfavorable aspects of [redacted] going to Mexico such as his lack of fluency in Spanish, difficulty in getting a work permit, etc.

Counsel also discusses [redacted] battle with depression and alcohol abuse which were the direct consequences of having devoted himself entirely to his work without investing in personal relationships. Counsel states that [redacted] gained control over these problems with the help of the applicant which he would lose if he were separated from the applicant for two years. Counsel discusses the psychological harm such separation would cause the child.

Section 212(e) EDUCATIONAL VISITOR STATUS; FOREIGN RESIDENCE REQUIREMENT; WAIVER.-No person admitted under § 101(a)(15)(J) or acquiring such status after admission-

> (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United

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States or by the government of the country of his nationality or his residence,

(ii) who at the time of admission or acquisition of status under § 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or

(iii) who came to the United States or acquired such status in order to receive graduate medical education or training,

shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under § 101(a)(15)(H) or § 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of § 214(k): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and does not represent exceptional hardship as contemplated by § 212(e) of the Act. See Matter of Bridges, 11 I&N Dec. 506 (D.D. 1965).

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

Matter of Savetamal, 13 I&N Dec. 249 (Reg. Comm. 1969), held that a permanent resident spouse would be forced to give up an established career and start over again upon his return to the United States after a two-year absence, should he accompany his wife abroad; should he stay in the United States, he would be faced with the unusual hardship of maintaining two households and their citizen child, two years old, would be deprived of the affection, emotional security and direction of its father, which is most important during its formative years.

The record contains specific documentation in the form of medical and psychological evaluations which, in their totality, reflect that [redacted] has certain medical and psychological problems, present and potential, which go beyond the normal. It is concluded that the record now contains evidence of hardships which, in their totality, rise to the level of exceptional as envisioned by Congress.

In this proceeding, it is the applicant alone who bears the full burden of proving his or her eligibility. Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957), and Matter of Y--, 7 I&N Dec. 697 (BIA 1958). In this case, the burden of proof has been met, and the appeal will be sustained.

It must be noted that a waiver under § 212(e) of the Act may not be approved without the favorable recommendation of the USIA. Accordingly, this matter will be remanded to the acting district director to file a Request For USIA Recommendation Section 212(e) Waiver (Form I-613) together with the waiver application in this case (Form I-612). If the USIA recommends that the application be approved, the application must be approved. On the other hand, if the USIA recommends that the application not be approved, then the application must be re-denied without appeal.

[redacted]

ORDER: The appeal is sustained. The director's decision is withdrawn. The record of proceeding is remanded to the director for action consistent with the foregoing.